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C O N F I D E N T I A L SECTION 01 OF 03 MANILA 002000

SIPDIS

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TAGS: PREL PGOV MARR RP

SUBJECT: SENATORS CALL FOR VFA RENEGOTIATION

REF: MANILA 1843 (VFA HEARING)

Classified By: Ambassador Kristie A. Kenney,
Reasons 1.4 (b) and (d)

SUMMARY

¶1. (C) On September 14, seven Philippine Senators introduced a resolution calling on the Arroyo administration to renegotiate the U.S.-Philippine Visiting Forces Agreement (VFA). The seven Senators are important legislators, including the Chair and Co-Chair of the Legislative Oversight commission of the VFA (LOVFA). The resolution, which has not been debated or voted on by the full Senate, constitutes an expression of sentiment and does not impose any binding obligation on the Philippine government, which has publicly supported the VFA since a controversial article appeared in the New York Times in August (reftel). While we believe the declaration is primarily motivated by election-related politics, even the generally pro-U.S. Senate moderates who signed onto the resolution have cited their concern that the VFA does not clearly define custody provisions in case a convicted U.S. military member exhausted all judicial appeals. Post would welcome an internal review by USG lawyers of the VFA's custody provisions. If so authorized, Mission can engage in quiet discussions with select Philippine officials to clarify the custody provisions, without opening up the broader VFA to renegotiation. End summary.

BACKGROUND

¶2. (C) Critics of the VFA turned out in force for an August 27 oversight hearing chaired by one of the Philippines' most strident and thorny politicians, Senator Miriam Defensor Santiago (reftel). Santiago convened the hearing in response to a New York Times article that stated that the U.S. Department of Defense had decided to extend the deployment of the 600-member Joint Special Operations Task Force Philippines (JSOTF-P). The story received widespread negative coverage in the Philippines, prompting Arroyo administration officials to defend JSOTF-P's mission in the face of questions from legislators and other critics about the constitutionality of the Task Force's deployment and U.S. intentions. The Ambassador and other Mission members worked closely with Philippine government officials to help them craft a strong defense of our bilateral security pact, and gave extensive press interviews to counter misperceptions about U.S. intentions fostered by leftist activists (reftel).

RESOLUTION EXPRESSES CONCERN

¶3. (U) The main argument of the resolution introduced on

September 14 (full text in para 6) is that the GRP should renegotiate or terminate the VFA because:

-- The VFA fails to specify the period of stay of visiting forces and to define what activities they can engage in;

-- An academic article by a former JSOTF-P commander discussed a theoretical possibility of U.S. involvement in combat operations;

-- The New York Times article (reftel) implied that "the main purpose of the U.S. troops is not to engage in joint military exercises, but to maintain the U.S. global war on terror, which is nowhere mentioned in the VFA;"

-- There are reasons to doubt the constitutionality of the VFA.

MODERATES ENDORSE, WITH RESERVATIONS

¶4. (C) Several of the senators who support the resolution are long-time and vocal opponents of the VFA and any U.S. military presence. Sens. Joker Arroyo and Francis Pangilinan both wrote unambiguously negative anti-VFA sentiments next to their signatures indicating their desire for immediate abrogation of the agreement. However, two more moderate senators who are generally supportive of the U.S.-Philippine security relationship penned less comprehensive reservations.

LOVFA Co-Chair Sen. Rodolfo Biazon expressed "reservations on some provisions" of the resolution, while Sen. Gordon

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wrote that his concern is the criminal jurisdiction for accused servicemen and that "otherwise I favor retention of the VFA." The final two Senators, Gregorio Honasan and Panfilo Lacson, did not append any comments.

COMMENT

¶5. (C) We believe that the declaration is primarily motivated by election-related politics. Santiago and most (if not all) of the authors of the resolution are running for reelection to the Senate or election to other offices in May 2010. Santiago and her colleagues are focused primarily on popular concerns that U.S. forces could engage in combat, or that the USG would establish permanent bases in the Philippines; these prospects hit a raw nerve with many Filipinos. Nevertheless, there is an issue nagging even Senate moderates: the VFA does not clearly specify where and under what circumstances American military personnel who are sentenced to imprisonment by a Philippine court would serve their sentences if all appeals prove unsuccessful. Post would welcome a review by USG lawyers to determine the best approach we can take to clarify the custody provisions. Following such a review, Mission would aim to establish this clarification through quiet discussions that would allow us to reach a common understanding with the Philippine government without the need to formally renegotiate the entire VFA. End Comment.

TEXT OF RESOLUTION

¶6. (U) Begin text of resolution.

FOURTEENTH CONGRESS OF THE REPUBLIC OF THE PHILIPPINES

Third Regular Session

September 14, 2009

SENATE

PS Res. No. 1356

Introduced by Senators Miriam Defensor Santiago, Rodolfo G. Biazon, Joker P. Arroyo, Richard J. Gordon, Gregorio B. Honasan II, Panfilo M. Lacson and Francis N. Pangilinan

RESOLUTION EXPRESSING THE SENSE OF THE SENATE THAT THE DEPARTMENT OF FOREIGN AFFAIRS SHOULD SEEK TO RENEgotiate THE VISITING FORCES AGREEMENT WITH THE UNITED STATES, AND IN CASE OF DENIAL, SHOULD GIVE NOTICE OF TERMINATION OF THE VFA

WHEREAS, the treaty-making power is shared by the President with the Senate, under the constitutional provision that: "No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate." (Article 7, Section 21);

WHEREAS, although the VFA calls itself a "visiting" agreement, it has been in force for some 10 years;

WHEREAS, the fatal flaw of the VFA is the failure to specify the period of stay of visiting forces, and the failure to define what are the "activities" that they can engage in while in Philippine national territory;

WHEREAS, as early as 2004, the pretense that US troops are intended only to train RP soldiers and to conduct joint military exercises, was belied in an article by the first commander of the Joint Special Operations Task Force Philippines, Col. David Maxwell, who wrote: "However, a correct reading of the Philippine Constitution reveals that it prohibits only the stationing of foreign forces in the Philippines. The Constitution does not prohibit combat operations and provides an exception to this if there is a treaty in force and a treaty has been in force between the two countries since 1951." ("Operation Enduring Freedom - Philippines: What Would Sun-Tzu Say?" US Army Combined Arms Center, Military Review, May-June 2004);

WHEREAS, on 18 June 2002, the same Col. Maxwell was also quoted by the Los Angeles Times, as saying that the Task Force was conducting operations "under the guise of an exercise." ("Rebels Shoot at US troops in the Philippines," by John Hendren);

WHEREAS, recently, on 21 August 2009, the New York Times

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reported: "Defense Secretary Robert M. Gates has decided to keep an elite 600-troop counterinsurgency operation deployed in the Philippines despite pressure to reassign its members to fulfill urgent needs elsewhere, like in Afghanistan or Iraq, according to Pentagon officials ... The high-level attention given to the future of the force, known as the Joint Special Operations Task Force Philippines;"

WHEREAS, in the same news story, Pentagon Press Secretary Geoff Morrell is quoted as saying: "While we have made real progress against international terrorist groups there, everyone believes they would ramp back up their attacks if we were to draw down," implying that the main purpose of the US troops is not to engage in joint military exercises, but to maintain the US global war on terror, which is nowhere mentioned in the VFA;

WHEREAS, in the 2009 case of Nicolas v. Romulo, the Supreme Court upheld the constitutionality of the VFA, on the ground that it has been "recognized as a treaty by the other contracting state," which is a requirement of the Philippine Constitution. (Article 18, Section 25);

WHEREAS, the RP Senate submits that the US has NOT recognized the VFA as a treaty, because the US Senate has never given its advice and consent to the VFA; instead, the US President merely transmitted to the US Congress the VFA and all other executive agreements, to comply with the Case-Zablocki Act;

WHEREAS, this American law requires the US President through

the Secretary of State, to transmit to the US Congress international agreements entered into by the US government, which are not characterized as treaties;

WHEREAS, the ruling in Nicolas that the US has recognized the VFA as a treaty, is contradicted by the language of the US law itself, which refers only to international agreements which are not characterized as treaties;

WHEREAS, in Nicolas, the Court adopted the theory that the VFA merely implements the RP-US Mutual Defense Treaty; but nowhere in the VFA (1998) is there any mention of the MDT (1951), both of which are separated in time by almost 50 years;

WHEREFORE, BE IT HEREBY RESOLVED, that it is the sense of the Senate that the Department of Foreign Affairs should seek to renegotiate the Visiting Forces Agreement with the United States, and in case of denial, should give notice of termination of the VFA.

Adopted,

/s/
MIRIAM DEFENSOR SANTIAGO
Chair
Legislative Oversight on Visiting Forces Agreement

/s/
RODOLFO G. BIAZON
Co-Chair, LOVFA

/s/
JOKER P. ARROYO

/s/
GREGORIO B. HONASAN

/s/
PANFILO M. LACSON

/s/
FRANCIS N. PANGILINAN

/s/
RICHARD J. GORDON

END TEXT
KENNEY